Overview

- Introduction
- Health care after September 11:
  - Public health
  - Can you report a terrorist/patient?
- New anti-terrorism law & health care
- Security and Privacy after September 11
  - More emphasis on security
  - What implication for privacy?
I. Background

- Clinton Administration Chief Counselor for Privacy
- Unusual double major:
  - White House coordinator for HIPAA medical privacy rule, 1999-2000
  - Chair, White House task force on how to update wiretap and surveillance laws for the Internet age
Currently

- Law professor, based in D.C.
- Consultant, Morrison & Foerster, especially for medical privacy
- Current writings on the anti-terrorism law and computer security
- www.osu.edu/units/law/swire.htm
II. Public Health

- Sec. 512(b) fairly broad
- PHI can be disclosed to a public health authority “authorized by law to collect or receive such information”
- Permitted purposes include public health surveillance, investigations & interventions
Disclosure also permitted, if authorized by law, to a person exposed to or at risk for a disease

Uses permitted by a covered entity that is a public health authority whenever it is permitted to disclose that PHI
Public Health -- Conclusions

- The rule permits what needs to be disclosed, if it is “authorized by law” -- check that
- Proper data handling needed by public health agencies:
  - Privacy -- good practices for patient data
  - Security -- make sure network is protected and data cannot be tampered with
III. Reporting Suspicious Activity

- Rule issued before Sept. 11. How well does it work today?
- What if a suspected terrorist is in the hospital? Can you report that?
- Example: patient exposed to anthrax, and you suspect person involved in making or distributing spores
When Can You Report?

- National security exception
- Avert serious threats to health or public safety
- Law enforcement rules generally
National Security Exception

- Section 512(k)(2)
- May disclose PHI “to authorized federal officials for the conduct of lawful intelligence, counter-intelligence, and other national security activities”
- Those activities as defined in law -- what you expect as “intelligence”
Averting Serious Threats

- Section 512(j) permits voluntary disclosure by a covered entity
- Must be “consistent with applicable law and standards of ethical conduct”
Averting Serious Threats

- Option 1, can disclose where:
  - “Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public”; and
  - “Is to a person or persons reasonably able to prevent or lessen the threat”
Averting Serious Threats

- Option 2, disclosure OK where:
  - “Is necessary for law enforcement authorities to identify or apprehend an individual”
  - “Because of a statement by an individual admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim”
  - That is, confessions to violent crimes
Averting Serious Threats

- Can’t disclose where confession is made as part of therapy for propensity to commit violent conduct
- Conclusion: the rule allows disclosure to avert serious threats, including by terrorists
General Law Enforcement

- Sec. 512(f) generally requires “in response to law enforcement official’s request”
- Covered entity can’t volunteer the information, except where required by a reporting law or requested by law enforcement
General Law Enforcement

- Court order, grand jury subpoena, administrative subpoena for full file
- To locate or identify a suspect, fugitive, material witness, or missing person:
  - Name, SSN, limited other information
Summary on law enforcement

- For anthrax suspect:
  - Likely national security
  - May have evidence, in good faith, of imminent threat
  - Can respond to law enforcement requests more broadly
- The rule holds up better than you might have expected to this new challenge
- But, still limits on your disclosure to the police
IV. New Anti-Terrorism Law

- Uniting and Strengthening America Act by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism
- USA PATRIOT Act
Some Relevant Provisions

- In general, changes to wiretap laws, foreign intelligence, money laundering, new terrorism crimes, etc.
- Some health care issues:
  - Biological weapons
  - Grand jury secrecy changed
  - Nationwide search orders
  - Computer trespasser exception
Biological weapons statute

- Sec. 817
- 10 years jail for knowing possession of any “biological agent, toxin, or delivery system of a type or in a quantity, that, under the circumstances, is not reasonably justified by a prophylactic, protective, bona fide research, or other peaceful purpose”
Grand Jury Secrecy Changed

- Current law: separation between law enforcement (grand jury, constitution applies) and foreign intelligence
- New law: “All the walls are down now” between FBI, CIA, etc.
- Example: you release PHI to grand jury, & records can go to foreign intelligence without notice to you or a judge
Nationwide search orders

- Current law: you must respond to an order from judge in your local federal district
- Section 220 USA-PATRIOT:
  - “Electronic” evidence: e-mail and web surfing records
  - Binding order from any federal judge in the country
  - What if the order seems overbroad? Must contest with that distant judge.
Computer Trespasser Exception

Current law:
- Under ECPA, can monitor your own system for security
- Can turn over evidence of past hacker attacks
- Can’t invite law enforcement to “surf over your shoulder” to investigate possible ongoing attacks -- that has been considered an open-ended wiretap
Computer Trespasser (cont.)

- Sec. 217 USA Patriot
- Now system owner can invite law enforcement to surf over the shoulder
- Only for
  - “Computer trespassers” with no reasonable expectation of privacy
  - Relevant to an investigation
  - No communications other than those to/from the trespasser
Computer Trespasser (cont.)

- Can covered entities authorize this surfing over the shoulder?
- Will PHI be disclosed? What if hacker downloads PHI?
- New & tricky issues under HIPAA
- Never any hearing on the provision -- may need guidance
V. Security & Privacy Today

- Greater focus on (cyber) security
- Security vs. privacy
- Security *and* privacy
Greater Focus on Security

- Less tolerance for hackers and other unauthorized use
- Cyber-security and the need to protect critical infrastructures
- Back-up needed in case of cyber-attack, attack on payments system, electricity grid, telephone system, or other systems you need
Security vs. Privacy

- Security sometimes means greater surveillance, information gathering, & information sharing
- Computer trespasser exception
- Report possible terrorists
- Err on the side of public health reporting
- In short, greater disclosures to foster security
Security and Privacy

- Good data handling practices become more important -- good security protects PHI against unauthorized use
- Audit trails, accounting become more obviously desirable -- helps some HIPAA compliance
- Part of system upgrade for security will be system upgrade for other requirements, such as HIPAA privacy
Greater law enforcement & anti-terrorism urgency after September 11

Medical privacy rule already has provisions to respond to September 11:
- Public health
- Report terrorists

Not clear so far that need changes here to HIPAA privacy rule
Concluding Thoughts

- Biggest messages today:
  - Data handling will have to improve
  - Computer security will get more attention and budget
  - Critical systems will need to be robust against new threats
  - Better data handling, in general, will lead to better privacy compliance, too
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